

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16/16836

(1)	REPORTABLE: YES NO
(2)	OF INTEREST TO OTHER JUDGES: YES NO
(3)	REVISED.
24.N.18	
<i>David Cassim</i>	

In the matter between:

TENDAI PASSION NDORO

First Applicant

AJAX CAPE TOWN FOOTBALL CLUB

Second Applicant

and

SOUTH AFRICAN FOOTBALL ASSOCIATION

First Respondent

NATIONAL SOCCER LEAGUE

Second Respondent

ADV NA CASSIM SC NO

Third Respondent

PLATINUM STARS FOOTBALL CLUB

Fourth Respondent

ORLANDO PIRATES FOOTBALL CLUB

Fifth Respondent

INTRODUCTION

1. The First Applicant, Mr Ndoro, is a professional football player. He is registered as a player with the Second Applicant, Ajax Cape Town Football Club ("Ajax"). Ajax is a professional football club. It competes in the National Soccer League ("NSL"), the Second Respondent cited in these proceedings. The NSL is a Special Member of the South African Football Association ("SAFA"), the First Respondent. SAFA governs and regulates professional football in South Africa. And SAFA, in turn, is affiliated to the Federation Internationale de Football Association ("FIFA"), the governing body of world football.
2. In the course of the 2017/18 football season, Mr Ndoro was registered with the NSL as a player with Orlando Pirates Football Club ("Pirates"), the Fifth Respondent, for whom he played one official game. Thereafter, Mr Ndoro was transferred to a football club in the Saudi Arabia league, Al Faissaly. There Mr Ndoro played official games in the period September 2017 to December 2017. The experience was not a happy one. Mr Ndoro complains that Al Faisaly did not honour its contract with him, and failed to pay him on time and on occasion, not at all. Mr Ndoro sought a transfer to Ajax and agreed the termination of his contract with Al Faissaly. He was transferred to Ajax during the transfer period in January 2018. On 12 January 2018 he was registered with the NSL as an Ajax player, and was fielded by Ajax in its official games on 12 January 2018 and 20 January 2018.

3. Towards the end of January, the NSL became aware of the fact that Mr Ndoro had played official games for Al Faisaly. The NSL took the matter up with Ajax, and advised Ajax that, pending confirmation by senior counsel, Ajax should not field Mr Ndoro in its official games. This position reflected the NSL's understanding of the FIFA regulations that permit of the registration of a player with three clubs in a season but, save under certain exceptions, preclude a player from playing for more than two clubs in a season.
4. On 26 January 2018, Mr Ndoro and Ajax brought urgent proceedings before the Dispute Resolution Chamber of the NSL ("the DRC") seeking an order that Mr Ndoro is eligible to play for Ajax in all its official matches during the 2017/2018 season.
5. Before the DRC, the NSL challenged the jurisdiction of the DRC to determine the relief sought by Mr Ndoro and Ajax. The NSL contended that the dispute fell within the jurisdiction of a different dispute resolution body – the Players' Status Committee ("PSC") constituted under FIFA's regulations.
6. The DRC ruled on 5 February 2018 that it enjoyed jurisdiction to determine the application brought by Mr Ndoro and Ajax, and that Mr Ndoro was immediately eligible to play for Ajax in all its matches.

7. The NSL appealed these rulings to the SAFA Arbitration Tribunal. (“the Arbitration Tribunal”) In terms of Article 23.9 of the NSL constitution read with Article 71 of the SAFA statutes, an appeal from a dispute arbitrated by the DRC lies to the Arbitration Tribunal. The Arbitration Tribunal is constituted by a Senior Counsel appointed by SAFA from its Arbitrator’s Panel.
8. Mr NA Cassim SC (“Mr Cassim”) was appointed as the arbitrator to determine the appeal.
9. Mr Cassim did so. He rendered an award on 28 March 2018. He upheld the NSL’s appeal, finding that the real dispute was not an employment related dispute (as the DRC had found) but rather a matter of status concerning Mr Ndoro’s eligibility to play for Ajax for the balance of the 2017/2018 season. This dispute, so Mr Cassim ruled, was a matter to be determined by the PSC. Accordingly, Mr Cassim declined to determine Mr Ndoro’s status.
10. The NSL have sought to refer the dispute to the PSC. Mr Ndoro and Ajax brought urgent proceedings to this Court seeking interim relief to interdict the NSL from preventing Mr Ndoro from playing, pending final relief sought, also on an urgent basis, to review and set aside the award of Mr Cassim and have the matter remitted to the Arbitration Tribunal to consider afresh the dispute concerning the status of Mr Ndoro.

11. The application for interim relief was dismissed by Sutherland J. The review comes before me.

12. It was common ground between the parties that the review is urgent, and I do so find.

THE ISSUES TO BE DETERMINED

13. Three sequential issues require determination by me. First, is the decision of Mr Cassim reviewable at all and, if so, on what basis? Second, if it is, have the Applicants made out grounds for review? Third, if so, what is the appropriate remedy?

IS THE DECISION REVIEWABLE?

14. Mr Cassim made his decision exercising powers as an arbitrator of the Arbitration Tribunal.

15. The Applicants bring their review on one or other of three bases. First, the Applicants say the decision may be reviewed at common law as a private power exercised by a voluntary association. Alternatively, the decision is reviewable under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Alternatively, the decision may be reviewed under the principle of legality. What the Applicants specifically disavow

is any reliance upon a review in terms of section 33 of the Arbitration Act 42 of 1965 ("The Arbitration Act").

16. Before me, the NSL and the Fourth Respondent, Platinum Stars Football Club ("Platinum Stars") contended that the arbitration before Mr Cassim was a private arbitration, and, in consequence, absent reliance on section 33 of the Arbitration Act, the Applicants must be non-suited.
17. The issue that I must determine is whether Mr Cassim's exercise of powers as the Arbitration Tribunal is indeed an award in a private arbitration or whether such powers are either public powers susceptible of review as a matter of public law or at least subject to discipline by a Court as the exercise of powers by a voluntary association.
18. Our Courts have not spoken with one voice as to whether sporting bodies that regulate a particular sport without statutory authority may nevertheless be characterized as private bodies that exercise public powers capable of review under PAJA.
19. It was long recognized at common law that there are certain private non-statutory institutions the powers of which concern the exercise of a public regulatory competence, and, in consequence, are subject to

judicial review. In *Dawnlaan Beleggings*,¹ the Court determined that the decisions of the Johannesburg Stock Exchange, though not a statutory body, affected not just those in privity of contract but the general public and the economy as a whole and such decisions were reviewable.

20. Since then, and notwithstanding the advent of PAJA, Courts have taken quite different positions as to whether a private body may be said to exercise a public function susceptible of judicial review. Some Courts have emphasized the primacy of the contract that binds parties and the consensual assumption of obligations. This has led to the conclusion that an association is a private regulator that does not exercise public functions.

21. Other Courts have inclined in the opposite direction. They have reasoned that where a non-statutory body enjoys monopoly powers of a coercive kind that are of general application to regulate matters that are of public interest and could readily have been the subject matter of statutory regulation to ensure public accountability, then such powers will more readily be characterized as the exercise of a public function.²

1. *Dawnlaan Beleggings (EDMS) BPK v Johannesburg Stock Exchange and Others* 1983 (3) SA 344 (W).
2. *AAA Investments (PTY) LTD v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at para 45.

22. These differences of approach have resulted in our Courts taking divergent positions when considering private associations that regulate a sporting code. In *Cronje*,³ it was held that the United Cricket Board was not a public body: it was privately funded, its basis was contractual not statutory and it was wholly unconnected to the State. In *Coetzee*,⁴ by contrast, a full bench of the Cape Court found that the NSL did perform a public function and its activities were of public interest. In *National Horseracing Authority of Southern Africa*,⁵ the Court was, *obiter*, divided on the issue. In *TIRFU*,⁶ the Court distinguished the conduct of the South African Rugby Union that concerned its internal affairs and conduct, sufficiently public in nature, to warrant the Court's supervisory jurisdiction (though the adoption of the criterion of public interest was questioned in *Calibre Clinical Consultants*⁷). And finally, *Nyoka*⁸ recognized that Cricket South Africa discharges a public function when it performs its role as the custodian of cricket and the national controlling authority.

23. The following principles emerge from this body of cases. First, private entities may discharge public functions by recourse to powers that do not have a statutory source. Powers of this kind may be characterized as public powers. So characterized, actions that issue from their

³ *Cronje v United Cricket Board of SA* (2001) 4 SA 1361 (T).

⁴ *Coetzee v Comitiss & Others* 2001 (1) SA 1254 (C); (2001) 22 ILJ 331 (C).

⁵ *The National Horse Racing Authority of Southern Africa v Naidoo* 2009 JDR 0117 (N).

⁶ *TIRFU Raiders Rugby Club v South African Rugby Union* 2006 JDR 0034 (C)

⁷ *Calibre Clinical Consultants (PTY) LTD and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) at para 36.

⁸ *Dr. Nyoka v Cricket South Africa* 2011 JDR 0460 (GSJ).

exercise may constitute administrative action. Second, a private entity may exercise public powers, but this does not entail that all its conduct issues from the exercise of a public power or the performing of a public function – all depends on the relevant power or function. Finally, while there are broad criteria for making an evaluation as to whether a competence enjoyed by a private entity is a public power or public function, there is no warrant to conclude that simply because a private entity is powerful and may do things that are of great interest to the public that it discharges a public power or function. Rather, it is the assumption of exclusive, compulsory, coercive regulatory competence to secure public goods that reach beyond mere private advancement that attract the supervisory disciplines of public law.

24. I turn to consider the powers exercised by Mr Cassim to determine whether they are public powers exercised by him that issued in administrative action.

25. The powers of the Arbitration Tribunal fall to be understood within the governing structures of professional football. FIFA is the international governing body of world football. FIFA's Statutes provide the constitutional framework for football associations that are affiliated to it. FIFA has issued regulations pursuant to its Statutes, including regulations concerning the status and transfer of players. SAFA is a member association of FIFA. SAFA has its own statutes that set out its powers and functions. SAFA has also issued regulations concerning

the status and transfer of players. The NSL is a special member of SAFA, recognized as such under the SAFA statutes. The NSL, in turn, has its own constitution. In addition, the NSL has issued the NSL Handbook. The NSL Handbook binds Member Clubs of the NSL and their players.

26. This institutional framework has two signal features. First, the institutions created by this body of regulations are hierarchical. FIFA and its Statutes enjoy supremacy. National associations show fealty to FIFA; members of national associations in turn are subordinate to their national associations; and member clubs and players are bound by this institutional hierarchy. Second, the institutional framework created by these statutes and regulations constitutes a comprehensive scheme of regulation of professional football.

27. The statutes of FIFA and SAFA frame the objectives of these organisations. They could not be more ambitious. The FIFA Statutes make it plain that FIFA draws up regulations to govern the game of football; to control every type of football association and to prevent infringements of its statutes, regulations or decisions; and to promote football globally in the light of its educational, cultural and humanitarian values.

28. The SAFA statutes state its objects: to pursue the public benefit of promoting football; to regulate football throughout South Africa; and to enforce regulations.
29. These bodies, (FIFA, SAFA and the NSL) constitute an institutional framework within which a comprehensive scheme of regulations is administered and enforced. Each entity is a private organization. Neither the entities nor their rules derive from public statutes. These associations and their relationships with their members are founded upon contracts.
30. But for all this, as a general matter, it is hard to escape the conclusion that what these bodies do and the objects they strive after are public in nature. First, the regulatory scheme constituted by the statutes and regulations is exclusive, comprehensive, compulsory and coercive. There is no other way to conduct professional football, save in compliance with this regulatory scheme. FIFA and its progeny are the singular source of professional football regulation. Second, compliance is not optional and the rules are backed by coercive sanctions. Third, although many actors participate in football for great private reward, football is not the sum of these private actions. Rather it is a sport so widely enjoyed and passionately engaged by large sections of the public that the flourishing of the game is a public good, and one that is often understood to be bound up with the well-being of the nation.

31. Once this is so, private associations that regulate football exercise public functions because they oversee a public good, and do not simply regulate private interests. And importantly, this is precisely how FIFA and SAFA see themselves. They seek to promote football as a public good and not as organisations simply furthering the private interests of their members.

32. I have also considered whether acts of regulation by FIFA, an association located in Zurich and registered in the Commercial Register of the Canton of Zurich, can qualify as administrative action under PAJA. In my view, where FIFA acts as a regulator of football within South Africa, its actions fall within the territorial jurisdictional purview of PAJA and such actions may qualify as administrative action under PAJA.

33. In my view, therefore, FIFA, SAFA and the NSL, though private associations, enjoy regulatory powers that discharge public functions. And when they do so, their actions amount to administrative action undertaken by juristic persons in terms of the empowering provisions of their Statutes and regulations. This renders such actions open to scrutiny by way of judicial review under PAJA.

34. This conclusion does not of itself answer the particular question as to whether the exercise of powers by Mr Cassim sitting as the Arbitration Tribunal is reviewable under PAJA. Not every power under the institutional arrangements I have described is necessarily a public

power simply because the arrangements more generally carry out public functions. Rather, it is a question of considering the particular power understood in the scheme of powers and institutions that I have described.

35. Both the NSL and Platinum Stars submitted that even if FIFA, SAFA and the NSL discharged certain public functions, disputes determined by the Arbitration Tribunal are instances of private arbitration and not subject to review under PAJA.

36. It will be recalled that Mr Nodoro and Ajax referred a dispute to the DRC. In terms of Article 23.1 of the NSL Handbook ("the Handbook"), the DRC is an independent Judicial Tribunal. Article 23.5 requires that the League, Member Clubs and Players refer all disputes between and amongst one another to the DRC. Among the matters that the DRC is given jurisdiction over is the determination of the status of Players (Article 23.6.1). The DRC is given powers to make orders to give effect to the Handbook and its rulings and awards are final, save for an appeal to the SAFA Arbitration Tribunal before a Senior Counsel appointed by SAFA from its Arbitrator's panel. (Articles 23.8 and 23.9)

37. The SAFA Arbitration Tribunal is established in terms of Article 71 of the SAFA Statutes. The Arbitration Tribunal is required to use impartial arbitrators and the proceedings must be conducted fairly. Article 71.3 requires every body or individual falling under the jurisdiction of SAFA

to resolve their disputes in accordance with the stipulated dispute resolution procedures.

38. It is certainly so that the Handbook and the SAFA Statutes reference the appeal from the DRC to the Arbitration Tribunal in the language of arbitration. The parties styled the appeal a submission to arbitration and Mr Cassim rendered an award.

39. The question is whether, in substance, the appeal to the Arbitration Tribunal is a private arbitration. I do not consider that it is. First, private arbitration is a voluntary agreement between parties to refer a dispute to arbitration. In so doing, the parties frame the dispute to be referred, the powers to be conferred on the arbitrator, and choose the arbitrator or the mechanism of appointment.

40. These essential attributes of party autonomy, choice and agreement are altogether lacking in respect of the Arbitration Tribunal. First, Mr Ngoro and Ajax referred their dispute to the DRC not because they and the NSL chose to do so (indeed they entirely disagree on this matter) but because Mr Ngoro and Ajax considered that they were required to do so. And whichever dispute resolution body should ultimately be determined to have jurisdiction over the dispute, that is a function of compulsory rule-making by FIFA, SAFA and the NSL. Second, the DRC is an institution created under the Handbook that the NSL, Member Clubs and players must use. How the DRC is constituted and

its powers is not chosen by the parties who submit their disputes to it. The DRC is not a species of private arbitration but is a dispute resolution body constituted by the regulatory scheme to enforce the rules created by that scheme.

41. A similar finding is warranted in respect of the Arbitration Tribunal.

Whether parties may appeal a DRC decision, to which body, and enjoying what powers is not left up to the parties to the dispute to determine. The rules do so. SAFA appoints the arbitrator from its panel. The Arbitration Tribunal is an appellate dispute settlement body forming part of the regulatory scheme to enforce the rules of that scheme. The fundamental features of private arbitration are lacking.

42. It may be contended that although the institutions of dispute settlement are created and compelled by the regulatory scheme, they are nevertheless a form of private arbitration because the parties agree to participate in these associations, and the rules, including dispute settlement, flow from agreement.

43. That contention cannot be accepted because, as I have explained, membership of the associations that make up the institutional framework of professional football are not in any real sense elective. FIFA, SAFA and the NSL have assumed exclusive competence to regulate professional football in South Africa. Players and clubs must join to participate, and on terms they are not free to determine on a

consensual basis. The dispute settlement bodies are an integral part of this regulatory scheme. How they are constituted, what disputes they determine, and with what rights of appeal flow not at all from voluntary adoption but coerced regulatory fiat. That is the very opposite of private arbitration.

44. There is a final submission made by Mr Redman SC, who appeared with Mr Tshikila, for the NSL that I must consider. They submitted that section 40 of the Arbitration Act is of application, and thus, even if the regulatory scheme is one constituting public powers, it may still reference an arbitration that is made subject to the Arbitration Act and its limited review jurisdiction under section 33.

45. Section 40 provides that the Arbitration Act applies to every arbitration under any law passed before or after the commencement of the Arbitration Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement.

46. The question is whether the referral to the Arbitration Tribunal in the Handbook and SAFA Statutes is an arbitration under any law? In my view it is not and for two principal reasons. First, for the reasons given, compulsory appellate dispute settlement under the Handbook and SAFA Statutes lacks the defining characteristic of an arbitration. For the purposes of section 40, there must be an arbitration provided for under the law. The Arbitration Tribunal is not a species of arbitration.

47. Second, the Handbook and the SAFA Statutes are not law. The Interpretation Act 33 of 1957 defines a law to mean any law, proclamation, ordinance Act of Parliament or other enactment having the force of law. I do not consider the Handbook and SAFA Statutes to be enactments having the force of law. PAJA in defining administrative action distinguishes an organ of state exercising a public power in terms of legislation and a juristic person exercising a public power in terms of an empowering provision. For reasons already given, a private entity may enjoy powers under its domestic statutes that amount to administrative action. Such private statutes are empowering provisions. But they do not constitute an enactment. An enactment is an act of law making by an organ of state. Hence the law referred to in Section 40 does not include the internal rules under which a private entity defines its competences.

48. I am of the view that the decision of Mr Cassim is administrative action, and unlike the position in *Sidumo*,⁹ I can see no reason why the regulatory powers of FIFA, SAFA and the NSL, which includes their dispute settlement provisions (as I have found) should not permit of the application of the public law disciplines of PAJA. Indeed, it is precisely because these private entities have assumed such sweeping exclusive regulatory powers that the need for such disciplines is apparent.

⁹ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC) at para 104.

THE JURISDICTION OF THE DRC

49. I consider next whether there are grounds to review Mr Cassim's award.

50. Mr Ndoro and Ajax rely on a number of grounds of review. Among them is the complaint that Mr Cassim made an error of law. Or, to use the language of section 6(2)(d), Mr Cassim was materially influenced by an error of law because he found that the DRC lacked jurisdiction to determine the dispute referred to it when the application of the relevant rules dictates that the DRC did indeed enjoy jurisdiction.

51. Since the DRC either did or did not enjoy jurisdiction under the relevant rules, and this is a question of law, I proceed to consider the jurisdiction of the DRC over the dispute referred to it.

52. The DRC decided that it enjoyed jurisdiction because it said that the dispute before it was an employment dispute concerning Mr Ndoro and the three clubs for which he had played in the 2017/18 season. The DRC considered that this type of dispute was of a kind that the FIFA Statutes require national associations to determine by recourse to an independent body established for this purpose – the DRC.

53. Mr Cassim found that the DRC's starting point was incorrect. The dispute did not concern Mr Ndoro's employment with a club but rather

his status as a player, and in particular his eligibility to play for Ajax for the remainder of the season in the light of Article 5 of the FIFA regulations on the status and transfer of players.

54. There can be little doubt that Mr Cassim's position as to how to characterize the dispute is correct. Mr Ndoro does not have a dispute with either Ajax or his former club, Al Faisaly, by whom he has been employed. His dispute is with the NSL as to whether the application of Article 5 permits him to take the field for Ajax for the balance of the season. That is plainly a dispute concerning his eligibility to play given the exclusionary rule, subject to limited exceptions, that a player is only eligible to play official matches for two clubs during one season. It is a matter of status, and it is not an incident of Mr Ndoro's employment contract.

55. Mr Arendse SC, who appears for the Applicants, submitted that even if the dispute was a status dispute, the DRC nevertheless enjoyed jurisdiction and Mr Cassim failed properly to apply the relevant regulations in deciding the appeal.

56. I consider whether this is so.

57. The NSL regulates all professional football in South Africa. It does so, as Article 4.3 makes plain, "in accordance with the prescripts of FIFA, CAF and SAFA within the constraints of South African law and the

National Constitution and in accordance with this NSL Handbook “. The Handbook recognizes the institutional hierarchical structure of football. The NSL is a member of SAFA, and SAFA is an affiliate of FIFA that seeks amongst other things to respect the statutes of FIFA and prevent their infringement.¹⁰ This hierarchy is important because the powers enjoyed by the NSL devolve from or, at the very least, must be congruent with the supremacy of the Statutes of FIFA and SAFA. I shall refer to this as the hierarchy principle.

58. The Handbook is divided into two parts. The first part sets out the constitutional provisions of the NSL, the second contains the rules of the NSL made in terms of the constitution.

59. Article 23 of the Handbook constitutes the DRC . Article 23.5 lists the parties who are required to refer all disputes to the DRC, save for disputes of a disciplinary nature which fall within the competence of the Disciplinary Committee. The parties made subject to this duty include the NSL, Member Clubs and Players.

60. Article 23.6 of the Handbook confers jurisdiction on the DRC. It says the following:

“The Dispute Settlement Chamber will have jurisdiction over, inter alia, the following issues or disputes in accordance with this NSL Handbook:

¹⁰ Article 2.6 of the SAFA Statutes.

23.6.1 *The determination of the status of Players* “

61. Mr Ndoro and Ajax have rightly placed some emphasis on this provision. If the dispute referred by them to the DRC is indeed a status issue, as I have found, then the Handbook would appear to afford jurisdiction to the DRC to determine the matter.

62. There are a number of features of Articles 23.5 and 23.6 that warrant attention. First, the only subject matter expressly excluded from the DRC are disputes of a disciplinary nature. Second, although all disputes, save for disciplinary disputes, between or amongst the named parties must be referred to the DRC, the DRC may not enjoy jurisdiction over all of these disputes. That depends upon whether the DRC enjoys jurisdiction under Article 23.6.

63. Secondly, Article 23.6 does not purport to give an exhaustive list of the issues or disputes over which the DRC enjoys jurisdiction. But the only point of including Article 23.6 must be to limit the subject matter jurisdiction of the DRC. Quite what the “*inter alia* jurisdiction” references is unclear, but it surely is not every other subject matter or Article 23.6 would simply have said that the DRC enjoys jurisdiction over all disputes, save for disciplinary disputes.

64. Thirdly, the introductory language of Article 23.6 contains a limitation. The DRC has jurisdiction over the listed issues, *in accordance with this*

NSL Handbook.¹¹ The Handbook states that it regulates in accordance with the prescripts of FIFA and SAFA (Article 4.3). Article 43.2 provides that should the Handbook be silent on a matter, the peremptory statutes of SAFA, CAF and FIFA apply. But this deals with gap filling, it does not seek to arrogate to the NSL powers at odds with the supremacy of the powers enjoyed by FIFA or SAFA. Accordingly, the NSL in its constitution does not assume jurisdiction over matters that FIFA or SAFA have the jurisdiction to determine. This is an instance of the hierarchy principle. Furthermore, the Handbook may, outside of Article 23.6, limit the scope of the DRC's jurisdiction.

65. The Rules comprise the second part of the Handbook. Chapter 2 of the Rules concerns the status, registration and transfer of players. Of importance is Article 29.2 that deals with jurisdiction over status disputes. Article 29.2.2 provides that : *“any dispute regarding the status of a player involved in an international transfer will be settled by the FIFA Players’ Status Committee”*.

66. The parties before me disagreed as to the significance and meaning of this provision. The Applicants describe this as a procedural rule. More importantly they submit that there is no dispute concerning the status of Mr Ndoro involved in an international transfer because the transfer of Mr Ndoro had occurred and been finalized before the dispute arose concerning his eligibility to play official matches for Ajax. The NSL

¹¹ My emphasis.

submits that the dispute does involve the status of a player involved in an international transfer because Mr Ndoro's eligibility to play for his Ajax falls to be determined by reference to a FIFA regulation and not the Rules of the NSC.

67. The Applicants appear to accept that Article 29.2 is a jurisdictional limitation upon the DRC but submit that it has no application to the dispute referred to the DRC.

68. In my view, Article 29.2.2 is of application to the dispute referred to the DRC. The status matter in dispute is Mr Ndoro's eligibility to play for Ajax for the balance of the season. His eligibility depends upon the application of Article 5.3 of the FIFA Regulation on the status and transfer of players. The regulation forms no part of the substantive rules contained in the Handbook. Moreover, Article 5.3 is a restriction that arises from the transfer of players between clubs. One type of such transfer is between clubs belonging to different associations. It is the involvement of Mr Ndoro in the international transfer between Al Faisaly and Ajax that triggers the status question as to whether he is eligible to play for the club to which he has been transferred. The transfer may have occurred before the dispute arose but it is the fact of the international transfer in which Mr Ndoro was involved that gives rise to the dispute as to his status.

69. On this interpretation of Article 29.2.2 of the Handbook, the Handbook itself limits the jurisdiction of the DRC over certain types of status disputes, and the dispute referred to the DRC falls within the limitation. The limitation in Article 29.2.2 makes sense because, as referenced, the restriction on eligibility at issue in respect of Mr Ndoro is not a substantive rule under the Rules in the Handbook. It is a FIFA regulation, and the jurisdictional limitation follows the provenance of the substantive rule.

70. This position is further reinforced by referencing what the FIFA Regulations on the status and transfer of players (“the FIFA regulations”) has to say about jurisdiction.

71. Article 1.1 and 1.2 of the FIFA regulations draws a distinction between the transfer of players between clubs belonging to different associations and transfers between clubs belonging to the same association. The latter transfers are governed by the specific regulations issued by the specific national association.

72. Article 22 of the FIFA regulations lists different types of dispute that FIFA is competent to hear. Articles 23 and 24 then regulate which of the listed disputes are adjudicated by the PSC and which by the DRC. The tabulated disputes in Article 22 do not reference the kind of status dispute between Mr Ndoro, Ajax and the NSL. But Article 23.1 stipulates that the PSC shall adjudicate :

“... on any of the cases described under article 22 c) and f), as well as on all other disputes arising from the application of these regulations, subject to article 24 “.

73. The dispute as to Mr Ndoro’s status does concern the application of Article 5.3 of the FIFA regulations, and thus falls within the scope of other disputes referenced in Article 23.1. It follows that under the division of jurisdiction effected by the FIFA regulations, the dispute as to Mr Ndoro’s status falls within the jurisdiction of the PSC.

74. One further feature of the disputes listed in Article 22 is salient. The listed disputes reference matters where there is an international dimension to the dispute or the dispute concerns clubs belonging to different associations. FIFA retains jurisdiction over disputes of this kind because its dispute settlement bodies are appropriate to adjudicate these matters, rather than the domestic dispute settlement bodies of one national association, much less of one of the members of a national association.

75. The division of jurisdiction reflects the hierarchy principle in that FIFA’s dispute settlement bodies adjudicate at the international level and in matters between associations and their players. This reflects a system of regulation with FIFA at its apex. It also avoids national associations seeking to assume jurisdiction over matters not exclusively domestic in nature. Were it otherwise, national associations

may contest for jurisdiction over such matters, and render separate and potentially conflicting decisions.

76. It is common ground that the dispute concerning Mr Ndoro's status turns upon an application of Article 5.3 of the FIFA regulations. That is not a domestic rule of the NSL in its handbook. The dispute also has an international dimension because the application of Article 5.3 references the international transfer of Mr Ndoro.

77. In these circumstances, I find it difficult to read the Handbook's provisions concerning the determination of status matters by the DRC without proper regard to what the FIFA regulations provide. The Handbook sets out substantive rules as to status. It is those status matters over which the DRC referenced in the Handbook has jurisdiction. THE DRC does not enjoy jurisdiction over status matters forming part of the FIFA regulations.

78. Given that the Handbook follows the precepts of FIFA, it would be odd for the NSL, a special member of a national association, to arrogate to itself jurisdiction over matters of status that FIFA has determined will be decided by the FIFA PSC. But I do not consider that the NSC has done so in the Handbook. First, because of the limitation of jurisdiction in Article 29.2.2 of the Handbook, and, second, because the Rules of the Handbook must be read with the provisions dealing with the jurisdiction of the DRC. A holistic reading limits which status matters

fall within the jurisdiction of the DRC under the Handbook. Such a reading best respects the Handbook's professed deference to FIFA and the hierarchy principle. It also avoids the incongruity that a special member of a national association could invest jurisdiction in a body, at odds with what the FIFA regulation has determined.

79. For these reasons, I do not find that the decision of Mr Cassim was vitiated by error of law. Mr Cassim found that the DSC lacked jurisdiction. That conclusion cannot be faulted. Although, the interpretative route by which I have come to share that conclusion is not entirely the same as that of Mr Cassim, that can make no difference to the ultimate result of the review brought by the Applicants. If Mr Cassim was correct in his conclusion as to jurisdiction, as I find he was, then the Applicants' review must fail because the review grounds relied upon, including mistake of law, cannot be sustained in the light of this finding.

COSTS AND CONCLUSION

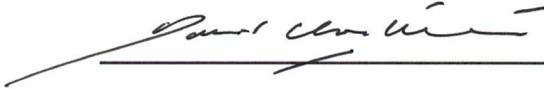
80. In the result, the Applicants cannot succeed in their review.

81. As to the question of costs, the parties have to this point taken the commendable position that the determination of their disputes have some complexity and concern matters of public interest and they should secure a definitive determination without seeking costs against one

another. The NSL and Platinum Stars have said however that this stance should no longer prevail in respect of this review. I do not understand why that is so. The review before me is if anything more likely than the earlier steps in this litigation to bring finality. The matters raised by the review are of general public importance for determining the supervisory jurisdiction of the Courts over the regulation of football. I consider therefore that each of the parties should bear their own costs.

82. I make the following order: the application in Part B of the Notice of

Motion is dismissed.

A handwritten signature in black ink, appearing to read 'David Unterhalter', is written over a horizontal line. The signature is cursive and somewhat stylized.

David Unterhalter

Judge of the High Court

Gauteng Local Division: Johannesburg.

Date of Hearing: 19 – 20 April 2018

Judgment delivered: 24 April 2018

Appearances:

Advocate for the Plaintiff: Norman Arendse SC instructed by AJ TAPPENDEN
& COMPANY

Advocate for the Defendant: Nigel Redman SC AND Simphiwe Tshikila
instructed by DMS ATTORNEYS